No. 94-68

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHIEDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

Petitioners,

vs.

NARRAGANSETT INDIAN TRIBE, GEORGE H. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF AND RESPONSE TO SUPPLEMENTAL MEMORANDUM

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Now come the Petitioners, by their attorneys, and submit the within Reply Brief in response to the Respondents' Brief in Opposition and Supplemental Brief. The within Reply Brief addresses the legal issues that the Petitioners believe require response. As to all remaining issues, the Petitioners rest upon the submissions contained within the Petition for Certiorari.

I. THE WITHIN PETITION HAS NOT BEEN RENDERED MOOT AS A RESULT OF THE NEGOTIATIONS BETWEEN THE TRIBE AND THE GOVERNOR OF RHODE ISLAND.

The Respondent Narragansett Indian Tribe [hereinafter Respondent] suggests to this Court that the within Petition has been rendered moot. In support of this contention, the Tribe points out that on August 29, 1994, they executed an agreement [hereinafter referred to as "August 29 Agreement"] with Rhode Island Governor Bruce Sundlun, which agreement purports to be a "compact" pursuant to the Indian Gaming Regulatory Act. 25 U.S.C. § 2710. Petitioners vehemently dispute the Respondent's suggestion that this development renders this case moot. Petitioners suggest that there are serious and significant doubts about the consitutional authority of the Governor of Rhode Island – in the absence of specific authorization from the Rhode Island General Assembly – to bind the State to many of the terms of the August 29 Agreement. If anything, the August 29 Agreement demonstrates more eloquently than anything that has come before the inequitable and absurd consequences that have flowed from the Court of Appeals' erroneous decision below. Thus, the case for this Court's grant of certiorari is

made more compelling as a result of the August 29 Agreement.

Petitioners recognize that the legal issues raised by the August 29 Agreement *per se* are not before this Court at this time. Nevertheless, in order to refute the suggestion of mootness, Petitioners feel compelled to alert this Court that the August 29 Agreement in no way represents a resolution of the important issues that are presented by this Petition. Among the issues that will require further determination should this Court deny certiorari:

1. Whether the Governor of Rhode Island, without specific legislative authorization, may enter into an agreement that delineates specific types of gaming that will be permitted within the State of Rhode Island. *See R.I. Const.* Art. 6, § 15 (conferring upon legislature exclusive authority to authorize and regulate gambling within Rhode Island); *see generally State ex rel. Stephen v. Finney*, 836 P.2d 1169 (Ks. 1992) (governor of Kansas had no authority to bind state to terms of tribal-state compact absent appropriate delegation of power by state legislature or legislative approval of compact).

2. Whether the Governor of Rhode Island, without specific legislative authorization, has the authority to suspend the operation of a particular Rhode Island statute that affords residents of a community the right to vote by referendum on the presence of casino gambling within their community. *See* R.I. Gen. L. § 41-9-1 *et seq.* (requiring referendum in host community and state wide prior to construction of casino in any Rhode Island community). The August 29 Agreement provides for a referendum prior to construction of any casino in the Town of West

Greenwich, Rhode Island, but would permit the Respondents to construct a casino in Charlestown, Rhode Island, without any referendum in that community.

3. Whether the Governor of Rhode Island may limit the subpoena power of the Rhode Island Judiciary and Rhode Island's Grand Jury. *See State v. Almonte*, No. 93-374-C.A., slip op. (R.I. July 12, 1994) (limitation on subpoena power constitutes violation of doctrine of separation of powers). *See generally R.I. Const.* Art. I, § 7 (preserving common law powers of grand jury).

4. In the event that IGRA somehow confers the aforementioned powers upon the governor of a state, whether Congress has the authority to re-order the branches of government of a state in such a manner. *See generally* U.S. Const. Amend. X (reserving certain powers to the states); U.S. Const. Art. VI, § 4 (guarantee of republican form of government to every state).

As the Petitioners have pointed out in the Petition for Certiorari, jurisdiction and sovereignty were finally and completely resolved among these parties in 1978. The resolution of these issues was embodied in Rhode Island Indian Claims Settlement Act ("RICSA"), 25 U.S.C. § 1701, *et seq.*, which involved the concurrence of all three branches of the federal government, as well as the executive and legislative branches of the State of Rhode Island. The Court of Appeals' decision in this case has upset the arrangements that were finally resolved in RICSA, and the potential results of that decision are highly disruptive of Rhode Island's state government. Far from rendering the controversy moot, the August 29 Agreement sharply illustrates the legal and political disruption that follows from the Court of Appeals' erroneous interpretation of IGRA's effect upon RICSA. This Court can restore the

balance by granting certiorari in this case and reversing the errors of the Court of Appeals.

II. OTHER PETITIONS PRESENTLY PENDING BEFORE THE COURT INVOLVE ISSUES SIMILAR TO THE ONES PRESENTED IN THIS PETITION.

This Court currently has before it other petitions that involve IGRA and its effect in various states. In particular, the following cases present issues that are related to the issues presented in this case:

> *State of Washington v. Spokane Tribe*, No. 94-357 (U.S. petition for certiorari filed August 26, 1994) (cert. pending) (whether IGRA violates Eleventh Amendment);
>
> *Poarch Band of Creek Indians v. Alabama*, No. 94-35 (U.S., petition for certiorari filed July 1, 1994) (cert. pending) (whether IGRA violates Eleventh Amendment);
>
> *Florida v. Seminole Tribe of Florida*, No. 94-12 (U.S., petition for certiorari filed July 1, 1994) (cert. pending) (whether IGRA violates the Eleventh Amendment);
>
> *Mosay v. Buffalo Brothers Management*, No. 94-14 (U.S., petition for certiorari filed June 29, 1994) (cert. pending) (IGRA regulatory issues);

As can be seen from these pending certiorari petitions dealing with IGRA and its impact upon the states, this statute has generated a significant amount of litigation. These issues are, obviously, of great significance to the States in which they have arisen. Indeed, the multi-State amicus brief filed in support of the within petition demonstrates the national breadth and significance of the issues that the Petitioners have presented. In addition, Rhode Island's two United States Senators, representing a total of 50 years of service in the Senate, have written as

amicus to urge this Court to address the important statutory construction issue involved in this case.

Given the significant issues of state sovereignty presented by IGRA generally and by this case in particular, the Petitioners respectfully submit that this case – together with the other IGRA petitions pending – affords this Court with an important opportunity to resolve the substantial issues of federalism and statutory construction that IGRA presents. Petitioners, accordingly, pray that this Court grant certiorari to decide these significant issues.

III. RESPONDENTS ARE FORECLOSED FROM CHALLENGING THE COURT OF APPEALS HOLDING REGARDING THE VALIDITY OF THE SETTLEMENT ACT

In Respondents' "Counter Statement of Facts", they once again take issue with Petitioners' assertion that the Tribe agreed to the State's jurisdiction over tribal lands in the settlement of the land claims litigation in 1978. Respondents' Brief in Opposition ("*Res*".) at 3. They assert that "[t]he Tribe agreed to no such thing." *Id.* Further, Respondents argue that RICSA does not apply to the Tribe's "post-sovereign" status. *Id.* at 3, 4. Both of these arguments were raised below, and both of the arguments were resoundingly rejected by the unanimous panel of the First Circuit Court of Appeals. *Pet. App.* at 16-19, 22 n. 10.

Further, Respondents have deliberately chosen *not* to file with this Court a cross-petition for writ of certiorari to challenge the Court of Appeals' concise holding in this regard within the time allowed under the Supreme Court's Rules. *See* S.Ct. Rule 15. Their efforts to dredge

up these arguments, in the context of their brief in opposition, should therefore be rejected by this Court.

IV. THERE IS EVIDENT TEXTUAL SUPPORT TO THE PETITIONERS' ARGUMENTS THAT THE NARRAGANSETT TRIBE CANNOT MEET THE JURISDICTIONAL PREDICATE REQUIRED UNDER IGRA

Respondents repeatedly argue that the Petitioners cannot, and do not, support their petition with reference to textual support in IGRA for the proposition that the Narragansett Tribe's lands are not subject to the IGRA's Class III provisions. *Res.* at 6. They further assert that the Petitioners seek to substitute the language of legislative history for the language of the statutory text. *Res.* at 7-10. They are mistaken on both points.

First, as the Petition for Writ of Certiorari takes great pains to point out, there is clear textual support for the position that *this* Tribe cannot avail itself of the Class III provisions of IGRA relating to Class III gaming. Simply stated, IGRA mandates that certain preconditions must be established by a tribe in order to institute the "Tribal-State Compact" process towards a Class III gaming facility under IGRA. 25 U.S.C. § 2710(d)(1)(A), § 2710(d)(3)(A). Stated another way, IGRA's plain textual language establishes that *not all tribes* in the country may request such a "compact" process under IGRA for the purpose of engaging in Class III type gaming. Only those tribes "having jurisdiction" over lands are granted congressional authority to institute such a process. *Id.*; *See also Pet.* at 8, 9; *Pet. App.* at 85, 87.

As this Court has highlighted repeatedly, when Congress chooses to use language requiring certain conditions to be met in a statute, it must be presumed that these preconditions and prerequisites must be followed in accordance with the clear terms of the statute. *Connecticut Nat. Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992) ("we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). When Congress provided in IGRA that only those tribes "having jurisdiction" over lands can institute IGRA's Class III provisions, it must be presumed that the predicate inquiry concerning a tribe's jurisdiction over its lands *must be undertaken in the first instance*. Thus, the initial inquiry in this case must focus on whether the Narragansett Indian Tribe "has jurisdiction" over its tribal lands in Rhode Island. The dictates for this inquiry flow directly from § 2710(d)(1)(A) and § 2710(d)(3)(A) of IGRA, and form the foundation for the Petitioners' argument. To suggest that Petitioners "do not start with the textual language", *Res.* at 6, is at best a complete distortion of the Petitioners' case.

Starting from this statutory predicate in IGRA, petitioners next argue that this Tribe does not "have jurisdiction" sufficient to meet this predicate because of their relinquishment of such "jurisdiction" to the State of Rhode Island in the 1978 Settlement Agreement, the RICSA, and the deeds of trust executed in 1988. Petitioners argue that there are no doubts about this. If doubts exist whether this tribe's transfer of jurisdiction at each stage leading up to IGRA rendered the tribe incapable of meeting the "having jurisdiction" requirement in IGRA, the "textual" language of IGRA certainly does little to resolve these doubts.

The legislative history to IGRA, however, answers any such doubts squarely: Believing that the RICSA divested this Tribe of the requisite "jurisdiction" needed in IGRA, the Rhode Island Senators and the sponsoring Senator expressed their belief that any *specific* language excluding the Narragansett Indian Tribe from IGRA would be completely redundant and unnnecessary. *See Pet.* at 11-13, *Pet. App.* at 102, 103. The answer was self-evident to the Senate; as a result of RICSA, the Narragansett Indian Tribe is one of the tribes of the country that simply does not "have jurisdiction" over its tribal lands sufficient to meet the prerequisites of IGRA's provisions, found in § 2710(d)(1)(A) and § 2710(d)(3)(A).

Indeed, the cases and authorities cited by the Respondents, when placed in this proper perspective, completely support the Petitioners' arguments. Respondents correctly point out that when the remarks of legislators, particularly the sponsor of legislation, are "consistent" with statutory language, they are to be afforded "great weight". *Res.* at 8. (Citation omitted.) That *is* the case here. The legislative history, in both the colloquy and the committee reports as initially drafted, are entirely "consistent" with the necessary predicate analysis, required in the statutory language of IGRA, of whether *this* Tribe has sufficient "jurisdiction" over its lands. IGRA §§ 2710(d)(1)(A), 2710(d)(3)(A). Accordingly, the legislative history is strong evidence that supports the Petitioners' interpretation of legislative intent.

The Petitioners seek not to elevate the legislative history in place of the statutory text; rather, proper resort to the legislative history as evidence of congressional intent that is "consistent" with the jurisdictional inquiry required in the text of IGRA is completely proper under

standard principles of statutory interpretation. Indeed, when so viewed, the Respondents concede the Petitioners' case. "Petitioners' position might have merit *if it was supported by statutory text . . .* " *Res.* at 6 (emphasis added). Petitioners assert that the text of IGRA does support their argument. The Narragansett Tribe does not "have jurisdiction" sufficiently over its lands to come within the terms of IGRA.

V. THE SENATE DID NOT "VOTE" TO INCLUDE THE NARRAGANSETT TRIBE IN THE CLASS III PROVISIONS OF IGRA

Respondents also seek to support their interpretation of statutory intent by arguing that "by vote of the Senate", a specific exclusion of the Narragansett Tribe was deleted. *Res.* at 7. Respondents argue that such a deletion, under rules of construction, establish congressional intent to authorize the Narragansett Tribe's efforts to institute IGRA's Class III provisions. *Id.* This two-tiered argument is flawed from the start.

As the Congressional Record makes clear, there was no "vote of the Senate" to delete former Section 23 (pertaining to the Narragansett Tribe) from the text of IGRA. On the contrary, Section 23 was removed at the request of Rhode Island Senator Claiborne Pell *prior* to any vote of the full Senate. This was based upon his belief, shared by Senators Chafee and IGRA's sponsor, Senator Inouye, that the specific limiting language relating to this tribe was merely redundant and unnecessary given the harmonious interplay of RICSA with IGRA. *See Pet.* at 11-13, *Pet. App.* at 102, 103.

Thus, the removal of the specific limiting language of the Narragansett Tribe, coupled with the retention of the

limiting language to tribes generally, found in IGRA's § 2710(a)(1)(A) and § 2710(d)(3)(A), proves that it was unnecessary for the Senate to provide a separate, special limitation for *this* tribe in IGRA.

VI. CONCLUSION

For the foregoing reasons, and for such reasons as appear in the original Petition for Certiorari, Petitioners respectfully pray that this Court grant its writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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